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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Donald J. Harman,

Plaintiff-Appellant,

vs.

La Crosse Tribune, Robert D. Johns, Daniel T. Flaherty, Terry C. Gillette, Alan C. Cole, Robert D. Johns, Jr., Galen W. Pittman, Robert S. Gallagher, Gerard O'Flaherty, and Kenneth O. Blanchard,

Defendants-Respondents.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

Jurisdictional Statement-State Civil Case

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QUESTIONS PRESENTED

Can the Wisconsin Supreme Court invoke the State adopted Canons of Professional Ethics so as to deny an attorney, who also served as a local legislator, First Amendment Rights of free speech and petitioning the government accorded other citizens of that state when that attorney acts in his capacity as a local legislator and the exercise of those First Amendment Rights conflict with the economic interests of his law firm resulting in his dismissal from employment with that law firm?

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IN THE SUPREME COURT OF THE UNITED STATES

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Donald J. Harman,

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Defendants-Respondents.

Jurisdictional Statement-State Civil Case

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, Donald J. Harman, files this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Wisconsin Supreme Court in this

case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court entered March 5, 1984, and the opinion of the Wisconsin Court of Appeals, District IV entered January 18, 1984, and the opinion of the Circuit Court of La Crosse County, Wisconsin entered October 6, 1982, are set out in the appendix hereto.

The decision of the Wisconsin Court of Appeals, District IV is reported as Harman v. La Crosse Tribune, 117 W.2d 448, 233 N.W.2d 536 (1984).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action for modification of the employee at will doctrine to recognize a public policy exception which draws into question the validity of state adopted Canons of Professional Ethics to infringe upon an attorney's constitutional

rights to freedom of speech and to petition the government for redress of grievances on the ground that such infringement is repugnant to the First Amendment to the Constitution of the United States and to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Canons of Professional Ethics as interpreted by the Wisconsin Courts denies First Amendment guarantees to an attorney who also served as a local legislator when the economic interests of that attorney's law firm conflict with the exercise of that attorney's constitutional rights.

The federal question of whether appellant was denied the right to freedom of speech and to petition the government for redress of grievances was raised by appellant in his amended complaint which is set out in the appendix hereto. The trial court raised the issue of whether a person who practices law agrees to some limitations on his first

amendment rights.

On October 6, 1982, the Circuit Court of La Crosse County, Wisconsin granted a Motion for Summary Judgment in favor of the respondents and against the appellant ruling that the states' interest in promulgating rules for the conduct of attorneys is of sufficient importance to justify the infringement of the exercise of free speech.

Appellant timely appealed the decision of the trial court to the Wisconsin Court of Appeals, District IV, arguing that there are inconsistent provisions in the Canons of Professional Ethics regulating an attorney's duties and responsibilities in representing clients and, as such, his constitutional guarantees could not be infringed by the state adopted Canons of Ethics as the attorney had no way of knowing which of the inconsistent provisions of the Canons of Ethics controlled. On January 18, 1984, the Wisconsin Court

of Appeals, District IV held that SCR 20.35(1), 20.34 and 20.34(2) controlled and ignored SCR 20.36(2)(a) and (b) in affirming the trial court.

A timely petition for review of the adverse decision of the Wisconsin Court of Appeals, District IV filed on February 29, 1984 was denied by the Wisconsin Supreme Court on March 5, 1984. The Notice of Appeal to this Court was timely filed May 29, 1984.

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Wisconsin on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: Stanton v. Stanton, 421 U.S. 7 (1975); Duren v. Missouri, 99 S.Ct. 664 (1979); Orr v. Orr, 99 S.Ct. 1102 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 942.03, Wisconsin Statutes (1973) states as follows:

GIVING FALSE INFORMATION FOR PUBLICATION. Whoever, with intent that it be published and that it injure any person, and with knowledge that it is false, communicates to a newspaper, magazine, or other publication any false statement concerning any person or any false and unauthroized advertisement may be fined not more than $200 or imprisoned not more than 6 months or both.

The Canons of Professional Responsibility, Wisconsin Supreme Court Rules (1982) provides as follows:

SCR 20.35(1), a disciplinary rule, provides in part: "A lawyer may not intentionally: . . . (c) Prejudice or damage the client during the course of the professional relationship, except as required under SCR 20.36(2)."

The title to SCR 20.34, also part of the rules, states: "A lawyer should represent a client zealously within the bounds of the law."

SCR 20.34(2), an ethical consideration provides in part:

(2) Ethical consideration, duty of the awyer to a client.

. . .

(f) In the exercise of his or her professional judgment on those decisions which are for his or her determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests fo his or her client. . .

. . .

(n) The obligation of loyalty to his or her client applies only to a lawyer in the discharge of his or her professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his or her client. While a lawyer must act always with circumspection in order that his or her conduct will not adversely affect the rights of a client in a matter he or she is then handling, he or she may take positions on public issues and espouse legal reforms he or she favors without regard to the individual views of any client.

SCR 20.36(2)(a) and (b) states as follows:

(2) A lawyer who receives information clearly establishing that:

(a) The lawyer's client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal.

(b) A person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

STATEMENT OF THE CASE

The appellant, Donald J. Harman, was employed continuously by the predecessors of or by Johns, Flaherty, Harman and Gillette, S.C. from June of 1962 to March 25, 1975. Prior to the commencement of appellant's employment with Johns, Flaherty, Harman and Gillette, S.C., that law firm or its predecessors had as one of its clients, the respondent La Crosse Tribune, the only daily newspaper published in the City of La Crosse. In 1966, appellant requested and was granted permission from his employers, more specifically, Robert D. Johns, Sr. and Daniel T. Flaherty, to run for a seat on the La Crosse County Board. Appellant was elected from his district in 1966 and served successive two year terms until 1977.

Appellant took an oath of office as a qualification for serving on the La Crosse County Board for each term that he was elected, by the terms of which he swore to

to support the Constitution of the United States and the Constitution of the State of Wisconsin and would faithfully discharge the duties of that office to the best of his ability.

Commencing June 16, 1974, respondent La Crosse Tribune published a series of news articles on county board matters alleging improprieties within the county highway department regarding building practices, bidding procedures and ethics code. From June of 1974 to November of 1974 there were 45 news stories and 15 editorials published demanding that the county board conduct an investigation into alleged highway irregularities.

The La Crosse Tribune repeatedly called for an investigation of the county highway department which culminated in a John Doe probe of the La Crosse County Highway Committee and the County Highway Commissioner.

At the same time of the investigation of

the county highway matters by the La Crosse Tribune, the entire La Crosse County Board membership, including appellant, was investigated by the La Crosse Tribune to determine whether there was any improper connection between their private employment and La Crosse County and whether board members, including appellant, abused the purchase of meals or liquor while on county business.

Appellant conducted his own investigation into the county highway alleged irregularities and in the fall of 1974 discovered that the July 17, 1974 published news story of the La Crosse Tribune alleging misappropriation of county crushed rock for the private use of the county highway commissioner was a false accusation. Appellant told each of his fellow shareholders in his employer, Johns, Flaherty, Harman and Gillette, S.C., except the respondents Robert D. Johns, Sr., who was then

in Florida, and Gerard O'Flaherty whose opinion was not sought, of his plan to accuse three employees of the La Crosse Tribune of furnishing false information to the newspaper contrary to Section 942.03 Wis. Stats. (1973). When first advised of appellant's plan, his fellow shareholders reacted in varying degrees of enthusiasm but none opposed the disclosure.

As a result of appellant releasing said accusation about three employees of the La Crosse Tribune to the La Crosse news media, the respondent La Crosse Tribune, by Kenneth Blanchard and Robert S. Gallagher, called for the dismissal of appellant from his law firm. On March 25, 1975, the respondents Flaherty, Cole, Johns, Jr., Gillette, Pittman and O'Flaherty voted to terminate the appellant's employment with Johns, Flaherty, Harman and Gillette, S.C.

Appellant later learned from respondent Gillette it was the respondent Blanchard who demanded that appellant be fired from the law

firm.

Subsequent to appellant publically disclosing that the July 17, 1974 news story contained false information, the appellant was informed by respondents Flaherty and Johns, Sr., that respondent Johns, Sr., had advised the respondent La Crosse Tribune regarding the July 17, 1974 news story prior to the publication of said news story. Respondent Johns, Sr. knowing appellant was a member of the County Board at the same time he gave advice to respondent La Crosse Tribune regarding the publication of the alleged misappropriation by the county highway commissioner did not inform appellant of a possible conflict of interest between the interests of a client of the law firm and appellant's legislative responsibilities.

The law firm respondents and appellant attempted to make a settlement of this matter from late December 1980 through February 1981. Pursuant to what the appellant imagined was a

demand for an outline of his cause of action, the appellant sent a proposed complaint against the individual respondents to each of them prior to the actual commencement of the action. The respondent Flaherty reacted angrily and both verbally and by a written letter tried to intimidate the appellant into not starting a lawsuit against any of the respondents.

Appellant commenced this action against the respondents on March 23, 1981, alleging that he was wrongfully discharged from his employment with his former law firm known as Johns, Flaherty, Harman and Gillette, S.C.. Appellant filed an amended complaint on February 10, 1982, alleging that the respondents had interfered with his First Amendment rights.

The La Crosse Tribune respondents and the law firm respondents brought on Motions for Summary Judgment in the trial court. The law firm respondents stated in supporting

affidavits of their Motion for Summary Judgment that they terminated the appellant's employment relationship only because of their concern for the effective representation of their client, the La Crosse Tribune, as a result of the conflict of interest posture of appellant to said client. The La Crosse Tribune respondents in affidavits supporting their Motion for Summary Judgment deny they interfered in anyway whatsoever with appellant's employment relationship with his employer, the law firm respondents.

Appellant states facts in his affidavits in opposition to the Motions for Summary Judgment which contravene the allegations of all the respondents and raise inferences that he was wrongfully discharged from his employment as his termination was motivated by bad faith, malice or in retaliation for his disclosure to the public of the false news stories printed by respondent La Crosse

Tribune, a client of appellant's law firm.

On October 6, 1982, the trial court granted the Motions for Summary Judgment in favor of respondents on the grounds that there was no bad faith on the part of the law firm respondents in the dismissal of appellant and that the La Crosse Tribune respondents did not tortiously interfere with appellant's employment relationship with his employer. The trial court did not find a denial of appellant's First Amendment rights and interjected the issue of state action by holding that the state had a legitimate interest in regulating the conduct of attorneys to justify the infringement of appellant's constitutional rights.

On January 18, 1984, the Wisconsin Court of Appeals, District IV, affirmed the decision of the trial court extrapolating from selected phrases of SCR 20.35(1), 20.34 and 20.34(2) in so holding while ignoring the complete text of SCR 20.34(2)(n) and 20.36(2)(a) and (b) which

are inconsistent provisions regarding an attorney's duties and responsibilities to a client and to the public.

On March 5, 1984, the Wisconsin Supreme Court denied appellant's petition for review of the decision of the Wisconsin Court of Appeals, District IV.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents important and substantial federal questions. Appellant alleges he was wrongfully discharged from his employment for exercising his constitutional rights to freedom of speech and to petition the government for redress of grievances when he chose to exercise said rights supposedly contrary to the economic interests of a continuing relationship between his employer, the law firm respondents, and its client, respondent La Crosse Tribune. The Wisconsin Supreme Court and Court of Appeals, District

IV, ignored well settled law that the constitutional guarantee of free speech is one of our most fundamental public policies which cannot be abrogated because of a desire to protect economic interests. Missouri v. National Organization for Women, 620 Fed.2d 1301 (8th Cir. 1980); Taylor v. Nashville Banner Publishing Company, 573 S.W.2d 476 (Tenn. App. 1978); and N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 73 L.Ed.2d 1215, 102 S.Ct. 3409, reh. den. (U.S.) 74 L.Ed.2d 160, 103 S.Ct. 199 (1982).

The trial court erred by interjecting the issue of state action into this lawsuit when it held that the promulgation of ethical standards for the conduct of attorneys is of sufficient importance to justify the infringement of appellant's First Amendment rights under the United States Constitution in this factual setting, particularly, when the law firm respondents do not allege any misconduct on the part of appellant in

obtaining the information regarding the false information supplied to its client, the respondent La Crosse Tribune, by three La Crosse Tribune employees.

The Wisconsin Supreme Court of Appeals, District IV, affirmed the trial court by holding that the Code of Professional Responsibility, SCR 20.01 to 20.51 "restricts an attorney's right of free speech when the speech would adversely affect their clients." The appellate court went on to say said rules and ethical considerations establish that an attorney has a duty of loyalty to the client to act in the client's best interests while representing the client and said duty runs from each member of a law firm to every client of the law firm.

In affirming the decision of the trial court, the Wisconsin Court of Appeals chose to ignore that provision of SCR 20.34(2)(n) which states as follows:

> . . . While a lawyer must act always with circumspection in order that his or her conduct will not adversely affect the rights of a client in a matter he or she is then handling, he or she may take positions on public issues and espouse legal reforms he or she favors without regard to the individual views of any client.

This provision appears to provide for attorneys to take public positions contrary to the views of a client as did appellant. This provision is even more appropriate in view of appellant's lack of knowledge as to any advice given to respondent La Crosse Tribune by respondent Robert Johns, Sr.

While the trial court and the appellate court suggest the appellant's First Amendment rights are limited by the parameters of the Code of Professional Responsibility adopted by the Wisconsin Supreme Court to support a duty of an attorney to the client as paramount to appellant's right to free speech other provisions of the Code of Professional Responsibility, more specifically, SCR

20.36(2)(a) and (b), clearly require that an attorney has an obligation to disclose a fraud perpetrated by a client.

Clearly, the Wisconsin Courts carefully fashioned a decision favorable to respondents and adverse to appellant premised on selected provisions of the Canons of Ethics to justify sufficient state interest to infringe appellant's First Amendment rights while completely ignoring contradictory provisions of the same Canons of Ethics.

Appellant, in his official capacity as a publically elected county board member, discovered that three employees of the La Crosse Tribune provided false information to a newspaper contrary to Wisconsin Statutes. The proof appears in the record in the form of affidavits. Under the Codes of Professional Responsibility, appellant clearly had an obligation to call upon the client of his law firm to rectify the fraud perpetrated by the

July 17, 1974 news story. As a result of appellant validly exercising his constitutional right to freedom of speech he was terminated from his employment which termination contravenes public policy just as certainly as does the termination of an employee for refusing to violate a constitution or statute.

This court has consistently held that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886,913, 73 L.Ed.2d 1215,1036, 102 S.Ct. 3409, reh. den (U.S.) 74 L.Ed.2d 160, 183 S.Ct. 199 (1982), citing Garey v. Brown, 447 U.S. 455,467, 65 L.Ed.2d 263, 100 S.Ct. 2286.

In New York Times v. Sullivan, 376 U.S. 254,270, 11 L.Ed.2d 686,701, 84 S.Ct. 710, 95 ALR2d 1412 (1964), this court held that there is a profound national commitment to the

principal that debate on public issues should be unlimited, robust and wide open.

The courts below decided appellant breached a duty to a client which client was the respondent La Crosse Tribune and thereby interfered with the economic relationship between the law firm and its client. Appellant did not accuse the client of any wrongdoing but only that three employees of the client furnished false information to the newspaper. There was no conflict of interest between the client and the law firm as appellant never claimed the respondent La Crosse Tribune violated the law.

A private person's free speech such as appellant's which contains neither falsehoods nor improper acts should be protected even when it interferes with a contract or business relationship such as the respondents' relationship with each other.

In summary, the opinion of the Wisconsin

Supreme Court affirming the Wisconsin appellate and trial courts is impossible to justify on any reasoned basis, and merits swift, summary reversal by this court. Cf. Turner v. Department of Employment Security, 423 U.S. 44 (1975) (summarily reversing Utah Supreme Court decision for inconsistency with this Court's clear Fourteenth Amendment ruling).

CONCLUSION

The decision below affirming the infringement by respondents of appellant's First Amendment rights should be summarily reversed and sent back to the Wisconsin Supreme Court for a decision on whether an attorney's First Amendment rights can be abrogated by state adopted Canons of Professional Ethics in order to protect the economic interests between attorney and client where said Canons of Professional Ethics have conflicting provisions regarding the duty

between attorney and client. Alternatively, this appeal should be accorded plenary review.

Respectfully submitted,

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